Supreme Court, U.S.
FILED
MAR 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1591

No. _____

In the

Supreme Court of the United States

REBECCA P. SCHWANECKE, M.D., F.A.A.P., as Next Friend of Certain MINOR UNBORN CHILDREN and Certain MINOR RECENTLY BORN CHILDREN, for and in behalf of such MINOR CHILDREN, as a class, ET AL,

Petitioners,

v.

VASEEM ALI, M.D., ET AL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals was required to apply the standards established by the U. S. Court of Appeals for the Fifth Circuit under 42 U.S.C. 1988 covering attorneys fees for a defendant who prevails in a civil rights lawsuit;

2. Whether the Court of Appeals violated the due process and equal protection of the laws clauses of the 14th Amendment to the U. S. Constitution by ruling that

- Unborn Children threatened and endangered by abortion in Texas,
- Children born alive after abortions but doomed to die shortly thereafter in Texas and
- Texas Citizens, Residents and Taxpayers challenging the lawfulness of the expenditure of public funds for abortion purposes

lacked standing to sue or to maintain the lawsuit, where Texas law recognizes the standing posture of all such human beings in judicial proceedings *not* involving abortion;

3. Whether this Court should reconsider and overrule *Roe v. Wade*, 410 U. S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), in light of:

- the existence of important factual matters presented by this case which were not before the Court in *Roe* and *Doe*;
- the existence of important consequences which were unintended by this Court in *Roe* and *Doe*;
- the existence of important factual errors or omissions in *Roe;*
- the existence of procedural and substantive constitutional errors in *Roe* and *Doe*; and
- the absence of personal jurisdiction over (a) Children who survive abortion only to die as a direct or indirect result thereof and (b) Unborn Children threatened and endangered with death by abortion; and

4. Whether Children born alive after abortions and Unborn Children threatened and endangered by abortion have

legal statuses under, and may claim the protection of, the 5th, 9th and 14th Amendments to the U.S. Constitution.

LIST OF ALL PARTIES

Petitioners:

REBECCA P. SCHWANECKE, M.D., F.A.A.P., As Next Friend for certain MINOR UNBORN CHILDREN in Harris County, Texas, and certain MINOR RECENTLY BORN CHILDREN in Harris County, Texas, for and in behalf of such minor children, as a Class;

ANN RICHARDSON, as Next Friend of the UNBORN CHILD of Jane Roe, for and in behalf of said UNBORN CHILD and all other MINOR UNBORN CHILDREN similarly situatied in Harris County, Texas, as a Class;

HEATHER BERKLEY AND BRENDA GOMEZ, Individually, and for and in behaif of all others similarly situated Citizens, Residents and Taxpayers of Texas, as a Class; and

HEATHER BERKLEY and BRENDA GOMEZ, as Next Friends of Certain MINOR UNBORN CHILDREN in Texas and certain MINOR RECENTLY BORN CHILDREN in Texas, for and in behalf of all such MINOR CHILDREN, as a CLASS.

Respondents:

VASEEM ALI, M.D.;
GARY L. BINDER, M.D.;
JOHN BRADY COLEMAN, M.D.;

JOE WESLEY RAMSEY, M.D.;
ALAN DAVID ROSEN, M.D.;
CULLEN WOMEN'S CENTER, INC., a Texas corporation;
HERMANN HOSPITAL FOUNDATION, A NONPROFIT TEXAS CORPORATION d/b/a Hermann Hospital;
NOVA HEALTH SYSTEMS, INC., a nonprofit Texas corporation d/b/a Reproductive Services, Inc.;
PLANNED PARENTHOOD OF HOUSTON AND SOUTHEAST TEXAS, INC., a nonprofit Texas corporation;
A DEFENDANT CLASS consisting of (1) all physicians or other persons practicing medicine in Harris County, Texas, licensed or unlicensed, who perform or who aid or assist directly in the performance of abortions in Harris County, Texas,in, upon or within the Natural Mothers of the Unborn Children Subclass or Class in paragraph nos. 1, and 2, respectively, under "PETITIONERS," above, and (2) all hospitals, clinics and other institutions or organizations, licensed or unlicensed, which provide Unborn Children in such Subclass or Class and/or which perform or aid directly in the performance of such abortions (through their officers, employees or agents);
UNIVERSITY OF TEXAS, an institution of higher learning of the State of Texas; and
JIM MADDOX, Attorney General of the State of Texas, in his official capacity.

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App.1-6) is not reported.

JURISDICTION

The Judgment of the Court of Appeals was dated and entered on June 27, 1985 (Pet. App. 9). A timely Motion for Rehearing was overruled by that Court on August 15, 1985. On November 6, 1985, the Supreme Court of Texas refused Petitioners' timely Application for a Writ of Error with the notation, "No Reversible Error" (Pet. App. 7).[1] A timely Motion for Rehearing was overruled by that Court on January 8, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. U. S. CONSTITUTION:

Article III:

Section 2. The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;* * *.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

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[1]The "No Reversible Error" (or "n.r.e.") notation means that the Supreme Court is "not satisfied" that the Court of Appeals has stated the law correctly on all points, but that the Application for a Writ of Error does not present error requiring reversal of the judgment (Rule 483, *Tex. R. Civ. Proc.*). Where this occurs, as here, the Judgment of the Court of Appeals does not become the Judgment of the Texas Supreme Court. E.g., *Commercial Standard Ins. Co. v. Marin*, 488 S.W. 2d 861, 864 (Tex. Civ. App.--San Antonio, 1972), err. Ref. n.r.e.

Aritcle VI, Second Paragraph:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

5th Amendment:

* * * [N]or shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *.

9th Amendment:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

10th Amendment:

The powers not delegated to the United States by the Constitution , nor prohibited by it to the States, are reserved to the States respectively, or to the people.

14th Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. U. S. STATUTORY LAW:

42 U. S. C. 1988 (Portion on Attorney's Fees):

* * * In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

By Petitions filed in the District Court for the 127th Judicial District, Harris County, Texas, Petitioners sought certain declaratory and injunctive relief against Respondents due to complained of abortion or abortion related activities. The lawsuit, which included two interventions, challenges essentially (1) the constitutionality of the expenditure of public monies of the State of Texas for abortion purposes, including the teaching of abortion procedures at the Medical School of the University of Texas in Houston, Texas, and (2) the constitutionality and jurisdictional bases of this Court's 1973 decisions in *Roe v. Wade*, 410 U. S. 113, and *Doe v. Bolton*, 410 U. S. 179.

After hearings, the District Court granted the motions of all Respondents for summary judgments and summary judgments were entered for them and against Petitioners. In addition, the Court, *inter alia*, denied the motion of certain Petitioners for summary judgment against Respondent Gary L. Binder, M.D., and awarded $830.00 in attorneys fees and expenses to Respondent Attorney General Maddox et al under 42 U.S.C. 1988.

On appeal, the Court of Appeals ruled that Petitioners lacked standing to bring or to maintain the lawsuit, thereby avoiding the constitutional and other issues on the merits. It upheld the award of attorneys fees on the grounds that Petitioners had not shown that the District Court abused its discretion (in awarding same), and that Petitioners had not shown any circumstances which would render such award unjust.

The Supreme Court of Texas refused Petitioners' Application for a Writ of Error with the notation, "No Reversible Error." Subsequently, that Court overruled Petitioners' Motion To Abate Cause (until this Court decided Case Nos. 84-495 and 84-1379, *Thornburgh v. American College of Obstetricians and Gynecologists* and *Diamond v. Charles*, respectively) and Motion For Rehearing.

The pertinent facts are these:

A. *State Involvement.* Respondent University of Texas owns or operates a medical school in Houston, Texas.

The University is affiliated with Respondent Hermann Hospital Foundation d/b/a Hermann Hospital ("Hospital"), with the Hospital providing building space, equipment, personnel, etc., and the University providing physicians (Tr. 299, 550-563). Abortions not required to save maternal life are performed at the Hospital (Tr. 548-549). Tax monies of the State of Texas are appropriated to the University for use by said medical school.[2]

Respondent Vaseem Ali, M.D. , teaches or instructs at such medical school (Tr. 291-292). It is alleged that she instructs on abortion methods or techniques. Ali is being defended by the attorney general's office, and state tax monies have been and are used in doing so (Tr. 295-296).

Respondents University, Hospital, Ali, and Attorney General Maddox are sued by (1) Heather Berkley and Brenda Gomez, as individual citizens, residents and taxpayers of Texas, (2) by a Texas-wide class of citizens, residents and taxpayers, represented by Berkley and Gomez, and (3) by a Texas-wide class of abortion endangered unborn children and abortion survivor children, represented by Berkley and Gomez as their Next Friends ("Berkley and Gomez Intervention"). These Intervenors seek primarily a declaration of rights and an injunction to prohibit these Respondents from engaging in or supporting the complained of abortion or abortion supportive activities.

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[2]For the year ending August 31, 1984, $83,650,825 was appropriated from the General Revenue Fund for the University of Texas Health Science Center at Houston, with the remainder of the Center's financing ($5,818,284) to come from "Estimated Other Educational, General, and Patient Income" sources. For said year, the Houston Medical School showed faculty salaries of $19,331,428, Departmental Operating Expense of $8,294,904 and Instructional Administration of $871,962. 3 *Gen. and Spec. Laws of the State of Texas*, 68th Leg., Reg. Session, pp. 6069-6070.

B. *Private Involvement.* The Hospital, Ali, four other physicians (Respondents Binder, Coleman, Ramsey, and Rosen) and three corporations (Respondents Cullen Women's Center, Inc., Nova Health Systems, Inc. and Planned Parenthood of Houston and Southeast Texas, Inc.) together with a Defendant Class of Harris County abortion practitioners and organizations, etc. which allegedly aid directly in the performance of abortions, are Respondents in a private setting. They are sued individually and in a class context for alleged abortion or abortion supportive activities. Respondents Hospital and Binder have stipulated to abortion or abortion supportive activities not required to save maternal life (Tr. 548-549, 681-682).

These Respondents are sued by (1) Rebecca P. Schwanecke, M.D., F.A.A.P., as Next Friend for a Harris County-wide class of abortion threatened and endangered unborn children and abortion "survivor" children (base lawsuit), and (2) by Ann Richardson, as Next Friend for and on behalf of a particular abortion threatened and endangered Unborn Child and on behalf of a Harris County-wide class of abortion threatened and endangered unborn children ("Richardson Intervention"). These Petitioners seek primarily a declaration of rights and an injunction to prohibit the complained of abortion activities of these Respondents and the Respondent Class.

C. *Roe and Doe.* All Petitioners are challenging the constitutionality and jurisdictional base of the judgments and decisions in *Roe v. Wade* or *Doe v. Bolton* (frontal and collateral attacks). All rely upon the revival of prior Texas anti-abortion law of U. S. Constitutional stature as a legal effect of *Roe*, assuming *Roe* to be a lawful decision.

D. *The Classes.* None of the alleged classes were certified by the District Court under Rule 42, *Tex. Rules Civ. Proc.*

E. *Federal Questions.* The challenges to *Roe* and *Doe* and the revival of prior anti-abortion law of U. S.

Constitutional stature were raised in pleadings and argument before the District Court (Tr. 338-362, 363-371, 372-392), and were raised on the merits in appellate and rehearing points of error before the Court of Appeals and the Supreme Court of Texas. The District Court believed that it was foreclosed by *Roe v. Wade* and granted summary judgments for Respondents (S.F. 25); the Court of Appeals avoided the questions by determining that Petitioners lacked standing to sue or to maintain the suit and by overruling Petitioners' motion for rehearing; and the Supreme Court of Texas refused Petitioners' application for a Writ of Error with the notation, "No Reversible Error," and overruled Petitioners' motion for rehearing. The attorneys fee and expenses award was raised on the merits as appellate and rehearing points of error before the Court of Appeals and the Supreme Court of Texas.. The Court of Appeals ruled on the merits against Petitioners and overruled Petitioners' motion for rehearing. The Supreme Court of Texas refused Petitioners' Application for a Writ of Error with the Notation, "No Reversible Error," and overruled Petitioners' motion for rehearing. The due process deprivation and equal protection discrimination questions from the decision of the Court of Appeals were raised on rehearing before the Supreme Court of Texas, and that Court overruled Petitioners' motion for rehearing.

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN UPHOLDING THE AWARD OF ATTORNEYS FEES

The Court of Appeals upheld the trial court's award of attorneys fees (and expenses) of $870.00 for Respondents Attorney General Maddox, Ali and the University. It did so on the grounds that Petitioners did not show that the trial court abused its discretion in awarding such fees, nor did they present any circumstances which would render the award unjust. These, however, are not the *standards* used by the U.

S. Court of Appeals for the Fifth Circuit for application under 42 U.S.C. 1988 where the prevailing parties are *defendants*.

The Fifth Circuit, in which Texas is located, has applied the "double standard" of *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412 (1978), for attorneys fees under the Civil Rights Act of 1964 to the award of attorneys fees under 42 USC 1988. Accordingly, it has ruled that a *defendant* who prevails in a lawsuit under 42 USC 1981-1986 is entitled to attorneys fees *only* upon establishment that the suit against him was "without foundation, unreasonable, frivolous, meritless or vexatious * * * [*Crawford v. Western Electric Co.*, 614 F. 2d 1300, 1321 (C.A. 5, 1980)]; or that plaintiff's claim "'was frivolous, unreasonable or groundless; or * * * the plaintiff continued to litigate after it clearly became so'" [*Lopez v. Aransas County I.S.D.*, 570 F. 2d 541, 545 (C.A. 5, 1978), quoting from *Christiansburg, supra*]; or that plaintiff's claim was "groundless, without foundation or vexatious" [*Herbert v. Monsanto Co.*, 682 F. 2d 1111, 1130 (C.A. 5, 1982)]. In the absence of a decision from this Court to the contrary, the Texas Court of Appeals was required to follow the standards adopted by the Fifth Circuit for attorneys fees under 42 U.S.C. 1988.

II.

THE COURT OF APPEALS VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE 14TH AMENDMENT OF THE U. S. CONSTITUTION IN HOLDING THAT PETITIONERS LACKED STANDING TO SUE

The Court of Appeals ruled that the Petitioners lacked standing to sue or to maintain the suit. This constituted a naked deprivation of life, liberty, and/or property rights of Petitioners under the due process clause of the 14th Amendment to the U. S. Constitution and a naked denial to them of the equal protection of the laws clause of said Amendment because, in *nonabortion settings,* Texas law recognizes clearly such standing to sue. In other words, the

court of appeals turned its collective back upon such other Texas law and subjected Petitioners to rights deprivations and discriminations simply because they appeared before the Court in a *lawsuit challenging abortion.*

A. *Citizens, Residents and Taxpayers.* Under Texas law, taxpayers have standing to challenge the lawfulness of the *expenditure* of tax funds to which they have paid in part. *Scott v. Graham,* 292 S.W. 2d 324, 329 (S.C. Tex., 1956); *City of Austin v. McCall,* 68 S.W. 791, 794-795 (S.C. Tex., 1902). Even a single taxpayer has legal standing to so complain "no matter how small" the amount of taxes that he has paid. *Terrell v. Middleton,* 187 S.W. 367, 369 (Tex. Civ. App.--San Antonio, 1916), err. ref. Contrary to what the Court of Appeals said, there is no requirement that the taxpayer(s) show any personal or particularized injury or damage by the complained of expenditure of funds. *Kordus v. City of Garland,* 561 S.W. 2d 260, 262-263 (Tex Civ. App.--Tyler, 1978), err. ref. n.r.e.; see *South Texas Publishing Co. v. Jahn,* 7 S.W. 2d 941, 945-946 (Tex. Civ. App. --Austin 1928), err. ref.[3] The individual Citizens, Residents and Taxpayers had standing clearly to challenge the expenditures at issue, and so did the Texas-wide class which they represented.

B. *Abortion Survivor Children.* Children born alive after abortion are U. S. and Texas Citizens (with extremely minor exceptions) under Section 1 of the 14th Amendment to the U. S. Constitution. Under Texas statutory law, they have the same rights, powers and privileges as those of children born after the normal period of gestation. *Texas Family Code,* § 12.05. Under Texas law, children who are born may sue, through next friend or guardian, for damages, to protect their

[3]The Citizens, etc., did allege personal and particularized injury of damage--abortion "ethic" posing a threat to them and their families, being forced to pay taxes to promote abortional killing activities and being defrauded and deprived of their rights to have the Defendants in Intervention obey the U. S. and Texas Constitutions and laws, etc.. (Tr. 376-377).

property interests, etc. E.g., *Leal v. C.C. Pitts Sand and Gravel, Inc.*, 419 S.W. 2d 820 (S.C. Tex., 1967). Abortion survivor children had clear standing to sue in this case.

C. *Unborn Children.* Finally , unborn children are entitled to sue or defend in actions affecting their property rights. *Mitchell v. Mitchell,* 244 S.W. 2d 803 (S.C. Tex., 1951); *Bradley v. Henry,* 239 S.W. 2d 404, 405 (Tex. Civ. App. -- Fort Worth, 1951), no writ; *Brantley v. Boone,* 34 S.W. 2d 409, 411 (Tex. Civ. App.--Eastland, 1931), no writ. A suit affecting the parent/child relationship may be brought after the first trimester of pregnancy, and the unborn child would be entitled to representation therein with exceptions not here pertinent. *Tex. Family Code,* §§ 11.10(a), 15.021. This right to be heard in judicial proceedings has been recognized by this and other courts. E.g., *McArthur v. Scott,* 113 U.S. 340, 391-392, 404 (1885); *Jefferson v. Griffin Spaulding Co. Hosp. Authority,* 274 S.E. 2d 457, 459 (S.C. Ga., 1981)); *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson,* 201 A. 2d 537, 538 (S. C. N. J., 1964), *cert. denied,* 337 U. S. 985.[4]

III.

ROE V. WADE AND DOE V. BOLTON, IF VALID, WOULD NOT PREVENT DECLARATORY AND INJUNCTIVE RELIEF AGAINST THOSE RESPONDENTS INVOLVED IN STATE ACTION AND ARE DISTINGUISHABLE FROM THE BERKLEY AND GOMEZ INTERVENTION

In its rush to deny standing to the Berkley and Gomez Intervenors (taxpayers, citizens and residents of Texas individually and in a class context and a class of affected unborn children and abortion survivor children,), the Court

[4]In *Brady v. Doe,* 598 S.W. 2d 338, 339 (Tex. Civ. App.--Houston, 14th Dist., 1980), err. ref. n.r.e., *cert. denied,* 449 U.S. 1081, standing to sue was denied to a certain woman who sued on behalf of a particular abortion-endangered unborn child to prohibit the mother from obtaining an abortion. *Brady,* however, was influenced heavily by *Roe v. Wade* and, for the reasons set forth *infra, Roe* is void as violative of the U. S. Constitution and laws.

of Appeals failed or refused to examine the nature of the Intervenors' substantial claims. *Roe* and *Doe* dealt with *private* abortion conduct, with restrictions imposed upon the states. They did not deal with *public* abortion conduct, where, as in the instant case, the state takes an active role in providing abortion services and promoting abortion. Had the Court of Appeals recognized this distinction, it might well have determined that some or all of the Berkley and Gomez Intervenors had standing to sue.

The abortion or abortion supportive conduct by the State of Texas at bar raises fundamental constitutional/legal issues not involved in a private patient/physician setting. The state has duties, interests and concerns that are not shared by the pregnant female and her physician. For example, abortion activity by a state:

• Wars against its basic duty to protect human life, including the lives of Children who "survive" abortions (e.g., U. S. Declaration of Independence, July 4, 1776; U. S. Const., 14th Amend., §1);

• Contradicts its "important and legitimate interest in protecting the potentiality of human life," whether before or after the "compelling" point of viability (*Roe v. Wade, supra,* 410 U. S. at 162-163);

• Contravenes its "strong and legitimate interest" in encouraging childbirth or normal childbirth [*Beal v. Doe,* 432 U.S. 438, 445-446 (1977)];

• Contravenes its "important and legitimate interest in preserving and protecting the health of the pregnant woman" (*Roe,* 410 U. S. at 162), including physical, emotional and psychological effects of abortion; and

• Contradicts substantial state law and policy, statutory and judicial, which provides to, or recognizes in, Unborn Children and Abortion "Survivor" Children rights under property, tort and other state law.

While this Court has ruled that a state may restrict or prohibit most abortions in public facilities [*Poelker v. Doe,* 432

U. S. 519, 521 (1977)] and may restrict or prohibit funding for most abortions [*Williams v. Zbarez*, 438 U. S. 358, 368-369 (1980); *Maher v. Roe*, 432 U. S. 464, 474-475, 479-480 (1977)] , it does *not* follow that the state may engage in abortion conduct and fund the same with public monies. Simply put, a state may not take steps to destroy posterity or to deny foundational principles of this Nation. Not only was such an issue not presented by such cases, but all of the states there involved were attempting *to preserve* human life and *to restrict* abortion conduct.

IV.
THIS COURT SHOULD RECONSIDER AND OVERRULE ROE V. WADE AND DOE V. BOLTON

For the Reasons and authorities set forth below, this Court should reconsider and overrule *Roe v. Wade, supra*, 410 U. S. 113, and *Doe v. Bolton, supra*, 410 U. S. 179. See *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938), overruling *Swift v. Tyson*, 16 Pet. 1 (1842); *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 406-408 (1932) (Dissenting Opinion of Justice Brandeis).

A. *Important Factual Matters Were Not Before the Court in Roe and Doe.* This case presents important factual matters which were not before the Court in *Roe* and *Doe:*

1. *Commencement of Human Life.* In *Roe*, this Court said that it "need not resolve the difficult question of when life begins" (410 U. S. at 159). Small wonder, since the *record* before the Court was *silent* on this subject.

In the instant case, however, there is uncontradicted scientific evidence that human life begins at conception (Tr. 119). Had such *evidence* been before the *Roe* Court, an *altogether different* question would have been presented, namely, whether the State of Texas was invested with sufficient

constitutional authority to protect the *actual human lives* of Unborn Children in the State from death by abortion.[5]

2. *Essential Characteristics of Unborn Human Life.* The *record* in *Roe* was *devoid* of essential scientific evidence on the characteristics of unborn human life. Hence, there was *no evidentiary base* for application of this Court's 14th Amendment "personhood" standards of *Levy v. Lousiana*, 391 U. S. 68 (1968), and *Glona v. Am. Guarantee & Liab. Ins. Co., supra*, 391 U. S. 73 (1968).

Such data are supplied by the instant case and by scientific advances since *Roe* and *Doe*. The record herein is uncontradicted that the Unborn Child is human, is alive and has a distinct biologic being or entityship (Tr. 119, 122-123). They are "humans, live, and have their being." *Levy, supra*, 391 U. S. at 70. As such, the Unborn Child meets squarely the test of 14th Amendment personhood formulated in *Levy* and the biological basis of such personhood expressed in *Glona*. See *Weber v. Aetna Casualty & Surety Co.*, 406 U. S. 164, 169 (1972). This *undercuts completely* the Court's 14th Amendment "nonpersonhood" holding for the Unborn in *Roe*. While that Amendment requires birth for *citizenship* status, no such requirement is made for *personhood* status. Personhood thereunder is a much broader concept and, as applied to natural persons, it means live human individuals, *cognizable in law*. The Unborn meet this test because they not only are living human beings but have well recognized legal statuses and rights postures under substantial Anglo-American jurisprudence. In addition, the biologic basis of such personhood has been furthered by recent scientific advances in the diagnosis *and*

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[5]The U. S. Declaration of Independence, July 4, 1776, makes it clear that the unalienable right to life begins at creation, not birth. "It is *always safe* to read the *letter* of the Constitution in the *spirit* of the Declaration of Independence." *Gulf, Colo. and Santa Fe. R. Co. v. Ellis*, 165 U. S. 150, 160 (1887). (Emphasis added.)

treatment of medical problems affecting the Unborn Child--as a *patient* of the physician.

B. *Roe and Doe Have Produced Various Unintended Consequences. Roe* and *Doe* have produced consequences or results which this Court did not intend:

1. *Abortion on Demand.* In *Roe,* this Court made it clear that a pregnant woman does not have an absolute right to terminate her pregnancy "at whatever time, in whatever way, and for whatever reason she alone chooses" (410 U. S. at 153). The Constitution does not require "abortion on demand" (410 U. S. at 208, Burger, C.J., Concurring Opinion). In *Doe,* the Court said that "*Roe v. Wade, supra,* sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand" (410 U. S. at 189). The opposite, as the Court may well take note, has occurred and continues. Well over one million Unborn Children are killed by abortion in this Nation each year. Abortion "Survivor" Children, who are U. S. Citizens, also die from abortion or its "ethic." In Texas, killing by abortion is "wide open" from conception to the commencement of childbirth. Even where a state proscribes abortion after viability, with life and health exceptions per *Roe,* the "health" meaning under *Doe* is so broad as to make such proscription more form than substance.

2. *Effect of Abortion and the Abortion "Ethic" on Children Who "Survive" Abortion.* Abortions and applications of the abortion "ethic" bring about deaths of U. S. Citizen Children who continue to live *after* they have been aborted. These Children die primarily as a result of prematurity, abortional injury or lack of care. Sometimes they are killed outright. See, e.g., *Showery v. State,* 690 S. W. 2d 689 (Tex. App.--El Paso, 1985). The appellate record shows that an Abortion "Survivor" *was murdered* at the Jefferson Davis Hospital in Houston on or about July 3, 1981

(Tr. 545-547). An Abortion "Survivor" lived for about 3 days at another hospital in Houston after his mother, allegedly during childbirth, was prescribed and took an abortifacient drug (Tr. 197-200). Moreover, since "unsuccessful" abortions (i.e., those resulting in live births) could translate into legal claims against the abortionists, etc., "success" is encouraged legally-to the naked detriment of Infant U. S. Citizens. *Stills v. Gratton,* 127 Cal. Reptr. 652, 657, 658-659 (Cal. App., 1st, 1976); see *The Ladies Center of Clearwater Inc. v. Reno,* 341 So. 2d 543 (Fla. App. 2d, 1977).

3. *Internal Legal Chaos. Roe* and *Doe* have introduced legal chaos in Texas and other domestic U. S. Jurisdictions relative to Unborn Children. They have substantial legal recognitions and rights, yet they may be killed by abortion. Under Texas law, for example, an Unborn Child has legal rights of representation, protection against prenatal torts, and rights under property law.

In a majority of U. S. Jurisdictions, *a stillborn child* who had reached the viability stage (or earlier, as in Georgia and Rhode Island) is a "person," etc. under their respective wrongful death or kindred statutes. Certain property interests may vest in an Unborn Child [*Gay v. Baker,* 58 N.C. 344, 345, 346 (S.C.N.C., 1860) (trust); *Chrisfield v. Storr,* 36 Md. 129, 145-146 (Ct. App. Md., 1872) (remainder in real property)]. A "duty of care" is owed to the Unborn Child under the prenatal tort injury doctrine, as recognized in all 51 domestic U. S. Jurisdictions. How can the "law" recognize a legal status and provide for or recognize legal rights in an Unborn Child when *Roe* and *Doe* authorize such Child to be destroyed by abortion on demand? Should the existence and protectability of legally cognizable rights be made to depend upon the *character* of the one who seeks to destroy the same?

C. *Important Factual or Other Errors Were Made by the Court in Roe.* The Court made a number of factual or other errors in *Roe*, most of which influenced improperly the Court's main holdings:

1. *Erroneous Consideration of Texas as a Party.* In several places, the Court indicated that Texas was before the Court or was a party to the proceedings (410 U. S. at 116, n. 54 at 157, 159 and 162). This made it appear that a more comprehensive proceeding was conducted.

Not only was Texas not a party (e.g., Record, *Roe v. Wade,* p. 109) but it *could not have been* a party because there would have been *no constitutional jurisdiction* in the U S. District Court to entertain such a case. It is well established that federal judicial authority, as circumscribed by the 11th Amendment to the U. S. Constitution, does *not* extend to a suit brought against a state in a U.S. District Court by a citizen(s) of that state *unless*, of course, the state consents to such a suit. *Hans v. Louisiana,* 134 U. S. 1, 9, 10-15 (1889) (leading case). The Plaintiffs in *Roe* were Citizens of Texas; they sued Henry Wade, District Attorney for Dallas County, Texas, in a U. S. District Court; and the State of Texas had not consented to such a suit.

On the other hand, it is settled that an action brought in a U. S. District Court against a State Officer, challenging the constitutionality of a State statute or seeking to enjoin its enforcement on constitutional grounds, as in *Roe,* is not a suit against the State, and is not prohibited under the doctrine of sovereign immunity. *Ex parte Young,* 209 U. S. 123, 159-160 (1908); *Sterling v. Constantin,* 287 U. S. 378, 393 (1932). It is treated as against the Officer alone, and Roe was such a case.

2. *Erroneous Purpose Ascribed To State Anti-abortion Statutes in Late 19th and Early 20th Centuries.* As for the "original purpose" of State anti-abortion statutes, the Court said that "The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus" (410 U. S. at 151). It cited *State v. Murphy,* 27 N.J.L. 112, 114 (S.C.N.J., 1858), as an example authority for such statement.

This statement and its context made it *appear* that the statutes were outdated *purpose-wise,* maternal health being protected by medical advances in the interim, and *enhanced unfairly* the Court's liberty to abort holding.

The fact of the matter is that, in the late 19th and early 20th centuries, the Courts made it quite clear that the purposes or objects of their anti-abortion statutes were to protect or safeguard *either* the Unborn Child *or* the Mother *and* the Unborn Child.[6] The Court's reliance on *Murphy* is poor because the Supreme Court of New Jersey pointed out *subsequently* that the statute which the *Murphy Court* construed "was further extended March 26th,1872 * * * *to protect the life of the child* * * *." *State v. Gedicke,* 43 N. J. L. 86, 90 (S.C.N.J., Feb. Term, 1881). (Emphasis Added.) Moreover, *Murphy* appears to stand alone, *not* as an *example* of authority for the Court's statement.

3. *Unfair Portrayal of the Common Law, as Expounded by Coke, Concerning Abortion.* The Court provided an *unfair picture* of the Common Law as to abortion by referencing Cyril Means, Jr. ["The Phoenix of Abortional Freedom," etc., 17 *N.Y.L.F.* 335 (1971)] and Lawrence Lader [*Abortion* (1966), pp. 78-79] each of whom was active

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[6]*State v. Howard,* 32 Vt. 380, 399 (S.C. Vt., 1859) (Mother and Child); *Dougherty v. People,* 1 Colo. 514, 523 (S.C. Colo., 1872) (Mother and Child); *State v. Gedicke,* 43 N.J.L. 86, 89-90 (S.C.N.J., Feb. Term, 1881) (Mother and Child); *State v. Watson,* 1 p. 770, 771, 772 (S.C. Kan., 1883) (Child); *Dietrich v. Inhabitants of Northampton,* 138 Mass. 14, 17 (S.J. Ct. Mass., 1884) (Child) (dictum in tort case); *Edwards v. State,* 112 N.W. 611, 613 (S. C. Neb., 1907) (Mother and Child); *State v. Miller,* 133 P. 878, 879 (S. C. Kan., 1913) (Mother and Child); *State v. Tippie,* 105 N. E. 75, 77 (S. C. Ohio, 1913) (Mother and Child); *State v. Ausplund,* 167 P. 1019, 1022-1023 (S.C. Ore., 1917) (Mother and Child); *Nash v. Meyer,* 31 P. 2d 273, 276 (S.C. Idaho, 1934) (Child); *Bowlan v. Lunsford,* 54 P. 2d 666, 668 (S.C. Okla., 1936) (Child); and *State v. Cox,* 84 P. 2d 357, 361 (S.C. Wash., 1938) (Mother and Child).

in the movement for the repeal of the abortion laws. [7] Means was especially critical of Coke's statements concerning abortion.[8]

The Court should have examined Coke's abortion statements (3 *Inst.* 50-51) in light of (1) the common law precedents, beginning with the abortion cases during the reign of King John, (2) the nature of a common law crime, i.e., "acts injurious to the public morals" or "acts which are mala in se" [*Clark, Handbook of Criminal Law* (3rd ed.) (1915), pp. 24, 25], and (3) how Coke was treated in this regard by English Courts and Legal Scholars.

In this latter regard, the Court of Chancery, in describing the rights of Unborn Children, said that the destruction of an Unborn Child was "murder" [*Millar v. Turner,* 27 E. Repts. 907, 908 (Ch., 1747-1748) (preceded by a reference to 3 Coke, *Inst.* 50)], and referred to the live birth murder rule described by Coke [*Beale v. Beale*, 24 E. Repts;.

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[7]See Nathanson, *Aborting America* (N.Y., 1979), pp. 55, 154 and 174 (Means), and pp. 29-36, 47-71, 82, 85, 116, 148-157, 163, 168, 172 and 307 (Lader).

[8]The chief problem with the Means article is lack of depth. He apparently was unaware of substantial English authorities on the subject of abortion. The earliest reported abortion case in post-conquest England was in the year 1200. Other early cases appeared in the years 1202, 1203, 1206 and 1221. E.G., *Select Pleas of the Crown AD 1200-1225* (Selden Society, 1887), Case Nos. 82 (1200), 26 (1202) and 73 (1203), pp. 39, 11 and 32, respectively. The four editions of *Boke of Justyces of Peas* (1506?, 1515, 1521 and 1544) contain an indictment which charged, *inter alia*, the felonious slaying of an unborn child. An interesting conviction for abortion occurred in the Court of Star Chamber during the reign of Elizabeth I. *Star Chamber Cases* (Soule and Bugbee) (Boston, 1881), reprinted from the edition of 1630 or 1641, pp. 19-20. Abortion remained an offense up to the enactment of Lord Ellenborough's Act in 1803, where abortion was first made a statutory offense in England. See III Chitty, *A Practical Treatise on the Criminal Law* (London, 1816), pp. 798-801. Abortion was also an offense in Scotland. See I *Select Justiciary Cases 1624-1650* (The Stair Society, Edinburgh, 1953), p. 81.

373 (Ch., 1713) and *Burdet v. Hopegood*, 24 E. Repts. 484 (Ch., 1718) citing the *Beale* case]. While Sir Matthew Hale, who was Chief Justice of the King's Bench from 1671-1676, disagreed with the live birth murder rule, he agreed that it was a "great misprison" if a woman quick with child took or another gave her "a potion to cause abortion,"
or if one struck her "whereby [the] child within her is killed * * *." II Hale, *The History of the Pleas of the Crown* (1st. Am. ed., with notes, etc. by Stokes and Ingersoll) (Phil., 1847), p. 563.
The writings of William Hawkins, Thomas Wood, William Blackstone and Edward East were consistent with Coke's live birth murder and abortion statements.[9] Even the Preamble to Lord Ellenborough's Act referred to abortion and other acts as "heinous Offenses," and an indictment was returned for the offense of abortion shortly before enactment in 1803 of that Act. III Chitty, *supra, A Practical Treatise on the Criminal Law*, pp. 798-801.

4. *The Erroneous Implication that Only a Minority of U. S. Jurisdictions Treated the Abortion of a "Quick" Unborn Child as a Crime.* The Court said that "[t]his is of some importance [the alleged contradiction of Coke and the claim that abortion after quickening was never established as a common law crime] because while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law, others followed Coke in stating that abortion of a quick fetus was a 'misprison,' a term they translated to mean 'misdemeanor'" (410 U.S. at 135). This made it *appear* that only a *minority* of U. S. Jurisdictions treated the abortion of a "quick" Unborn Child as

[9] I Hawkins, *A Treatise of the Pleas of the Crown* (c. 1716) (Curwood, London, 1824), ch. 13, pp. 94-95; I Wood, *An Institute of the Laws of England* (3rd. ed., Holborn, Eng.) (1724), ch. 1, p. 11; I Blackstone, *Commentaries on the Laws of England* (c. 1765), pp. 129-130; IV Blackstone, *Commentaries on the Laws of England* (c. 1769), p. 198; I East, *A Treatise of the Pleas of the Crown* (Phil., 1806), ch. V, p. 227.

a crime, and *buttressed unfairly* the Court's conclusion as to the "far freer" prevailing abortion practices in the major part of the 19th century (410 U. S. at 158).

The fact of the matter is that where the woman was "quick with child," *all* courts which considered the question (to Petitioners' knowledge) said that abortion was a crime, etc. at common law.[10] Where the woman was not "quick with child," *most* courts which considered the question said that abortion was not an offense at that stage of pregnancy. However, a *respectable minority* of U. S. courts concluded that it was an offense to abort at any stage of pregnancy.[11]

5. *Erroneous Claim as to When the States Began Generally To Replace the Common Law with Legislation.* The Court said that "It was not until after the war between the States that legislation began generally to replace the common law" (410 U. S. at 139). This made it *appear* that State anti-abortion legislation was a latter-19th century development, and it *enhanced unfairly* the Court's "far freer" abortion practice view, above.

The fact of the matter is that, when the War between the States ended (April-May, 1865), there were only 36 States of the United States and, of that number, 27 States had anti-abortion statutes then in effect. See Dissenting Opinion of Justice Rehnquist in *Roe v. Wade,* 410 U. S. at fn. 1, pp. 175-176.

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[10]E.g., *State v. Steadman,* 51 S.E. 2d 91, 93 (S.C.S.C., 1948); *Commonwealth v. Parker,* 50 Mass. 263, 266 (S.J.C. Mass., March Term, 1845); *Smith v. State,* 33 Me. 48, 55, 57 (S.C. Me. 1851); *State v. Alcorn,* 64 P. 1014, 1016 (S.C. Idaho, 1901); *State v. Cooper,* 22 N.J.L. 52, 58 (S.C.N.J., 1849); *Mitchell v. Commonwealth,* 78 Ky. 204, 210, (Ct. App. Ky., Sept. Term, 1879); *State v. Stafford,* 123 N.W. 167, 168 (S.C. Iowa, 1909); see *Gray v. State,* 178 S.W. 337, 338 (Tex. Crim. App., 1915).

[11]Mills v. The Commonwealth, 13 Pa. St. 630, 632-633 (S.C. Pa., 1850); *State v. Slagle,* 82 N.C. 566, 567-568, 83 N.C. 544, 545 (S.C.N.C., 1880); *State v. Reed,* 45 Ark. 333, 334-336 (S.C. Ark., 1883); *Munk v. Frink,,* 116 N.W. 525, 527 (S.C. Neb., 1908).

6. *Erroneous Use of Maternal Mortality Rates.* The Court said, "Mortality rates for women undergoing *early abortion,* when the procedure is legal, appears to be as low or lower than the rates for *normal childbirth*" 410 U. S. at 149; see p. 163). (Emphasis added.) The Court used this (1) to show that the concerns of the States in enacting their anti-abortion statutes of protecting women from a hazardous procedure were no longer valid, and (2) to support the Court's conclusion as to when the State's interest in protecting maternal health becomes "compelling."

The Court, however, *misused* what it had noticed: The proper mortality comparison was not female deaths from "early abortions" versus female deaths from childbirth because the subjects of comparison are markedly different. Childbirth lasts 3 trimesters; "early abortions" occur in or around the first trimester. The proper procedure would be to compare the number of maternal deaths resulting from a *specified number of early abortions* with the number of maternal deaths resulting from the same number of *early pregnancies.* The Court's use of the mortality rates, in short, was palpably erroneous and unfair.[12]

D. *Important Constitutional Errors Were Made Procedurally and Substantively.* The Court made a number of constitutional errors in *Roe* and *Doe* and, hence, the Judgments and Decisions in these cases are void. See, e.g., *Windsor v.*

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[12]The Court apparently was unaware of the facts (1) that the concept of human fertilization was not understood until after the discovery of the mammalian ovum (of a dog) in 1827 [Flanagan, *The First Nine Months of Life* (N.Y., 1962), Preface, p. 9], thereby making substantially less significant the failure of the later Common Law to cover abortions before the woman was "quick with child"; and (2) that the first anti-abortion enactment in this country was that of the New York City Common Council of July 27, 1716, which, *inter alia,* prohibited midwives, under penalty of fines or jail terms in default of payment, from giving counsel or administering any "Herb Medicine or Potion, or any other thing to any Woman being with Child whereby She Should Destroy or Miscarry of that she goeth withall before her time" [*New Perspectives on Human Abortion* (ed. by Hilgers, Horan and Mall) (Frederick, Md., 1981), ch. 15, p. 199, citing "Minutes of the Common Council of New York" 3 (1712-1729): 121, at fn. 2, p. 203 (Emphasis added.)], thereby showing a serious early concern for the problem of abortion and without reference to any "quick with child" distinction.

McVeigh, 93 U. S. 274, 277-284 (1876); *Johnson v. Zerbst,* 304 U. S. 458, 467-468 (1938). These errors are summarized below:

1. *No Representation.* Neither Abortion "Survivor" Children nor Unborn Children threatened and endangered by abortion were represented before the U. S. District Courts or this Court in *Roe* and *Doe* (except that Unborn Children were represented for a 10-day period before the District Court in *Doe*), as they were entitled. The Judgments of all such Courts, therefore, were unconstitutional and void as to them. See U. S. Const., 5th Amendment (due process); *McArthur v. Scott, supra,* 133 U. S. at 391-392, 404 (Unborn Children); *Pennoyer v. Neff,* 95 U. S. 714, 733-734 (1878) (U. S. Citizens); Rule 19, F.R. Civ. Proc.

2. *No Personal Jurisdiction.* Neither the U. S. District Courts nor this Court had personal jurisdiction over such Abortion "Survivor" or Unborn Children (except for said 10-day period for the Unborn in the District Court in *Doe).* Yet each such category of Children was affected vitally by those proceedings, and had a right to be before the Courts through next friends or guardians. The Judgments of all such Courts, therefore, were unconstitutional and void as to them. Ibid.

3. *Invidious Discriminations.* The discriminations against Abortion "Survivors" and Unborn Children as compared to the non-aborted born and corporations are invidious. For example, corporations, which are artificial beings and not mentioned in the U. S. Constitution, are "persons" under the due process and equal protection clauses of the 14th Amendment thereof, while actual unborn human beings, recognized in law and possessive of substantial legally cognizable rights, are denied personhood. A prematurely born child of 7-month gestational age has 14th Amendment personhood while an older and more developed Unborn Child of 8-months gestational age does not. Neither

the 5th nor the 14th Amendments to the U. S. Constitution can justify such crazy-quilt discriminations.

4. *Failure to Apply Pre-existing Supreme Court Decisions Concerning Human Personhood Under the 14th Amendment.*

The Court failed to apply the "live," "human" and "having a being" test of 14th Amendment personhood (*Levy v. Louisiana, supra,* 391 U. S. 68) and the "biological" test of such personhood (*Glona v. American Guarantee and Liab. Ins. Co., supra,* 391 U. S. 73) to the affected Unborn Children. If such constitutional interpretive decisions can be overlooked or disregarded, how can it be maintained that a constitutional interpretive decision has "law of the land" ranking?

5. *Failure To Apply the Constitutional Implied Rights Concept to 14th Amendment Personhood for the Unborn.* Since a born person has 14th Amendment recognition, and since such a person does not originate at birth, it follows that 14th Amendment recognition extends to such person prenatally. The person after birth is the self-same person before birth, only at a different developmental stage. The human genetic code is present at conception (Tr, 119). The implied rights cases of constitutional stature *[e.g., Griswold v. Connecticut,* 381 U.S. 479 (1965)] *were misapplied* on the issue of personhood.

6. *Failure To Apply Properly the Constitutional Implied Rights Concept to "Liberty" Under the 14th Amendment.* While "liberty" is a broad concept, "life" is the most basic of rights for, without it, all other rights and interests are *meaningless.* Where was the correlation between "liberty" and the right to destroy unborn life? Or the basis for the "fundamental" ranking of such right? Not only was abortion a crime at common law and in Texas and Georgia, but the legal and social heritage of this Nation viewed abortion not as a "right" but as a naked wrong. Moreover, the Constitution protects the life rights of persons against certain governmental

deprivations, and *nowhere* does it give any human being the right to destroy the life of another. If the implied rights decisions of this Court were applied properly, the life right of the Unborn would have prevailed clearly over any liberty to destroy the same.

7. *Naked Deprivations of Rights.* The due process clause of the 5th Amendment stood as a bar to this Court's holdings in
Roe and *Doe* which endangered the rights of Abortion "Survivors" and authorized the destruction of a large body of legally cognizable rights of the Unborn. See *Marbury v. Madison,* 5 U. S. 137, 163 (1803); *Munn v. Illinois*, 94 U. S. 113, 130 (O. T., 1886).

8. *Manufacture of the Right of Abortion, Etc.* In *Roe* and *Doe*, the Court violated Article III of the U. S. Constitution by creating a constitutional liberty and by restricting the states of *their* reserved constitutional authorities to legislate in this area. This also violated the unenumerated rights of the people, as guaranteed by the 9th Amendment, and the Division of Powers Concept, as guaranteed by the 10th Amendment. See *Erie R. v. Tompkins, supra,* 304 U. S. at 77-78, 79-80. Procedural "due process," as applied to the Infant Victims of Abortion, was also denied, in violation of the 5th Amendment. The Abortion "Survivors," for example, were not even considered by the Court. Finally, the Court violated the supremacy clause of Article VI by authorizing the destruction of rights cognizable under federal statutory law (e.g., insurance and ADC benefits under the Social Security Act, Subchapters II and IV, 42 U.S.C. 401 *et seq.* and 42 U.S.C. 601 *et seq.*, respectively) and, in the case of Infant Texas Victims, by authorizing their destruction in violation of Texas anti-abortion law of U. S. Constitutional status revived as a legal effect of *Roe* (assuming *Roe* to be a lawful decision).

E. *The Court Lacked Personal Jurisdiction Over the Infant Victims of Abortion.* As shown above, the District Courts in *Roe* and *Doe* lacked personal jurisdiction over the

Infant Victims of abortion (except for a 10-day period in *Doe*). This deficiency infected with unconstitutionality the review proceedings in this Court. Accordingly, all such Judgments are void. They cannot operate to deprive the Unborn Children and Abortion "Survivor" Children in this lawsuit--who were not even in gestation when those "Judgments" were rendered--of their rights under United States and Texas law. See *McArthur v. Scott, supra*, 113 U. S. at 391-392, 404; and *Pennoyer v. Neff, supra*, 95 U. S. at 733-734. They are unique, individual human beings (Tr. 119).

CONCLUSION

For the reasons and authorities stated, it is submitted respectfully that the petition for a writ of certiorari should be granted.

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Attorney of Record for
Petitioners

March 1986

APPENDIX

OPINION OF THE COURT OF APPEALS
(June 27, 1985)

Court of Appeals
First Supreme Judicial District

OPINION

REBECCA P. SCHWANECKE, M.D., F.A.A.P., ET AL,
APPELLANTS

No. 01-84-0664-CV

V.

VASEEM ALI, M.D., ET AL,
APPELLEES

On Appeal from the 127th District Court of Harris Counrty,
Texas
Trial Court Cause No. 79-34630

****

This is an appeal from six summary judgments wherein the appellants sought to enjoin the performance of abortion procedures in Texas, the expenditure of public funds for these procedures, declaratory relief as next friends for the classes of unborn and recently born children, and for declaratory relief for the classes of taxpayers of Texas. The trial court rendered judgment for the appellees and awarded them attorney's fees.

We affirm.

In 1979, appellant Schwanecke filed a class action suit on behalf of children born following abortion attempts. Appellants Richardson, Berkley, and Gomez intervened, adding unborn children and taxpayers to the class. The petitions, taken together, challenge the constitutionality of the expenditure of public funds for abortion purposes and the

constitutional and jurisdictional bases of the United States Supreme Court decisions in Roe v Wade, 410 U. S. 113 (1973), and Doe v. Bolton, 410 U. S. 179 (1973).

The appellees, who are doctors, a private hospital, and a state medical educational institution, relied principally on Roe v. Wade in filing their motions for summary judgment. All of the appellees' motions were granted, including those motions seeking attorney's fees incurred by appellees Dr. Vaseem Ali, Attorney General Jim Mattox, and the University of Texas. The appellants' motions for class certification, discovery, appointment of a guardian ad litem, and summary judgment were denied.

The appellees assert that the appellants lack standing to bring or maintain this suit. We initially address this issue, as it is dispositive of the case.

The appellants allege a cause of action in both their personal and representative capacities. The appellees charge that the appellants cannot point to an agreement which violates the Texas Constitution or is otherwise illegal, nor can they point to a particularized injury or damage that they have suffered personal to themselves.

The common law rule of standing requires that the claimant show a personal and particularized injury or damage to present a justiciable controversy before the court. The common law rule of standing, which is still followed today, was originally set out in City of San Antonio v Stumburg, 70 Tex. 366, 7 S.W. 2d 754 (1888):

> We think it a principle established by the overwhelming weight of authority in the courts of all countries subject to the common law that no action lies to restrain an interference with a mere public right,at the suit of an individual who has not suffered or is not threatened with some damage peculiar to himself.

See also Scott v. Board of Adjustment, 405 S.W.2d 55, 56 (Tex. 1966). The claims made by the appellants in their individual capacities do not establish standing, because the appellants as individuals have not shown a personal and particularized injury or damage so as to establish a justiciable cause of action. See City of San Antonio, 7 S.W.2d at 754.

As individual taxpayers, however, the appellants would have standing to bring suit to enjoin the expenditure of public funds *not yet expended* under an agreement in violation of the Constitution or otherwise illegal. Kordus v. City of Garland, 561 S.W.2d 260, 262 (Tex. Civ. App.--Tyler 1978, writ ref'd n.r.e.). However, whether public funds are to be expended on abortions is a legislative and not a constitutional question. See Harris v. McRae, 448 U. S. 297, 320 (1980); see also Maher v. Roe, 432 U. S. 464, 481 (1977).

The appellants contend that public funds are being used in a manner that violates the letter and spirit of the constitution. They assert that because the University of Texas owns and operates a medical school affiliated with Hermann Hospital, the expenditure of funds for teaching and performing abortions is unlawful. The appellants rely on section 10 of article VII of the Texas Constitution, which provides that the purpose of the University is "for the promotion of literature, and the arts and sciences." They point to the fact that both Dr. Ali, an employee of the University of Texas, and Attorney General Jim Mattox are paid with state funds and that this expenditure of public funds amounts to unlawful use of these funds.

The appellants also claim as taxpayears that the expenditure of public funds for abortion violates the constitution and is unlawful. The appellants do not direct us to any agreement that violates the constitution or that is otherwise illegal. They do not contend that the funds to be expended (not yet expended) are solely public funds, or that the legislature in appropriating the funds designated them for purposes other than for the purposes used. The appropriation and expenditure of public funds is a legislative, as opposed to judicial, function

and the appellants do not argue that any appropriation statute is unconstitutional or otherwise illegal. We hold, therefore, that the appellants do not show standing to maintain this suit as taxpayers, because they fail to meet the test set out in Kordus.

The appellants' contentions that they are entitled to a class certifications as representati es of (1) taxpayers, (2) recently born children, and (3) unborn children are without merit. The prerequisites for class certification or a class action are set out in rule 42 of the Texas Rules of Civil Procedure as follows:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

The appellants claim that they are taxpayers and are therefore entitled to represent a class of taxpayers, and that as taxpayers they do show a particularized injury or damage and can qualify under rule 42 as class representatives. However, since the alleged personal representatives of the class lack standing in their personal capacities, because they failed to show a particularized injury or damage, the claim on behalf of the class of Texas taxpayers also fails. See Tex. R. Civ. P. 42 (a) (3); see also *Kordus*, 561 S.W.2d at 262.

The appellants cite section 12.05 of the Texas Family Code to support their claim that the class of recently born children is entitled to the relief. That section provides that a child born alive after an abortion or premature birth has the same rights, powers, and privileges as any other child born alive after the normal gestation period. The appellants apparently construe this provision to mean the class is entitled

to a guardian ad litem, and that they should be the guardian ad litem.

However, recently born children are not entitled to the appointment of a guardian ad litem in this case. A guardian ad litem may be appointed to represent a party who is represented in a suit by a next friend or guardian with an interest adverse to the party. See Tex. R. Civ. P. 173. In this case, the class of recently born children have legal guardians , who are either their parents or the Department of Human Resources, see Tex. Fam. Code Ann. Sec. 17.011 (Vernon Supp. 1985). It has not been shown that either of these legal guardians have an adverse interest to the recently born child. Thus, these recently born children are not entitled to the appointment of a guardian ad litem, and the alleged representatives, as guardian ad litems, would lack standing to sue. See Tex. R. Civ. P. 42(a) (3); see also Allred v. Heaton, 336 S.W.2d 251 (Tex. Civ. App.--Waco 1960, writ ref'd n.r.e.).

The appellants also claim they should be able to represent the class of unborn children as next friends. However, the class of unborn children are not subject to representation by next friend, Brady v.Doe, 598 S.W.2d 338, 339 (Tex. Civ. App.--Houston {14th Dist.] 1980, writ ref'd n.r.e.), and thus the class is not entitled to representation by representatives whom (sic) would be acting as next friends. See Tex. R. Civ. P. 42(a) (3);see also Allred, 336 S.W.2d at 261-62.

The only remaining point regarding standing is procedural. The Texas Supreme Court has held that a claim of lack of justiciable interest must be called to the trial court's attention in a written plea and a ruling thereon must be obtained on the plea; otherwise, the claim is waived. Texas Industrial Traffic League v. Railroad Com'n of Texas, 633 S.W.2d 821, 823 (Tex. 1982). The written plea, however, must be judged by its substance and not by its label. Austin Neighborhoods Council v. Board of Adjust. of the City of Austin, 644 S.W.2d

560, 565 (Tex. App.--Austin 1982, writ ref'd n.r.e.); see also Tex. R. Civ. P. 71.

The appellees did not challenge the appellants' standing by a plea in abatement, but rather raised the issue in their motions for summary judgment. However, the appellants failed to object to that manner of presentment and therefore waived their right to complain of any error of form. See Tex. R. Civ. P. 166a (e).

Accordingly, the appellants' points of error one through seventeen are overruled.

In their final four points of error, the appellants contend that the trial court erred in awarding attorney fees to appellees Dr. Ali, Attorney General Jim Mattox, and the University of Texas under section 1988 of thae United States Code.

The appellees sought attorney's fees in a motion subsequent to the granting of their motion for summary judgment. The motion for attorney's fees was accompanied by an affidavit setting forth the expenses incurred by the appellees' attorney. Under section 1988 and after determining the appellees should prevail, the trial court awarded attorney's fees amounting to $830 as part of the costs.

To recover attorney's fees under section 1988, the court is guided by the principle that the prevailing party should recover attorney's fees "unless special circumstances would render such an award unjust." Planned Parenthood v. Citizens for Community Action, 558 F.2d 861, 870 (8th Cir. 1977) (citing *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968)). Moreover, section 1988 awards are reversible only when the appellant shows the trial court abused its discretion in awarding the attorney's fees as cost. Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981).

The appellants have not shown how the trial court abused its discretion nor any circumstances which would render the award unjust. Appellant's points of error 18 through 21 are overruled.

The trial court's judgment is affirmed.

/s/ Sam Bass
Sam Bass
Associate Justice

Associate Justices Smith and Duggan also sitting.
No publication. Tex. R. Civ. P. 452.

JUDGMENT RENDERED AND OPINION DELIVERED
JUNE 27, 1985.
TRUE COPY ATTEST;

/s/ Kathryn Cox
KATHRYN COX
CLERK OF THE COURT

ORDERS OF THE SUPREME COURT OF TEXAS REFUSING APPLICATION FOR WRIT OF ERROR [NO REVERSIBLE ERROR] AND OVERRULING MOTION FOR REHEARING

(November 6, 1985, and January 8, 1986, respectively)

IN THE SUPREME COURT OF TEXAS

No. C-4543 — 6 November 1985

Rebecca P. Schwanecke, M.D., F.A.A.P. ET AL.	§		
	§	From	Harris County
vs.	§		
	§		First District
Vaseem Ali, M.D.,ET AL.	§		

Application of petitioners for writ of error to the Court of Appeals for the First Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, Rebecca P. Schwanecke, M.D., F.A.A.P., et al., and Surety, Lawyers Surety Corporation, pay all costs incurred on this application.

No. C-4543 January 8, 1986

Rebecca P. Schwanecke, M.D., F.A.A.P. ET AL. §
§ From Harris County
vs. §
§ First District
Vaseem Ali, M.D., ET AL. §

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I Mary M. Wakefield, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

Witness my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 8th day of January, 1986.

Mary M. Wakefield, Clerk,

By /s/Courtland Crocker, Deputy.
Courtland Crocker

[SEAL]

NRE

JUDGMENT OF THE COURT OF APPEALS
AND ORDER OF THE COURT OF APPEALS
OVERRULING MOTION FOR REHEARING
(June 27, 1985, and August 15, 1985, respectively)

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Appeals for the First Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A.D. 1985, present Chief Justice FRANK G. EVANS, AND ASSOCIATE JUSTICES Justices JAMES F. WARREN, KENNETH M. HOYT, JACK SMITH, SAM BASS, LEE DUGGAN, JR., D. CAMILLE DUNN, MURRY B. COHEN AND BEN G. LEVY.

In the cause

REBECCA P. SCHWANECKE, M.D., F.A.A.P., ET AL.
Appellant
No. 01-84-00664-CV

vs.
From HARRIS County
Tr. Ct. #79-34630
Opinion by Bass, AJ

VASEEM ALI, M.D., ET AL,
Appellee
the following judgment was rendered June 27, 1985:

"The cause heard today by the Court is an appeal from the judgment rendered and entered by the court below on September 18, 1984.

After hearing the cause on the transcript of the record and inspecting the same, it is the opinion of this Court that there was no error in the judgment. It is therefore CONSIDERED, ADJUDGED, and ORDERED that the judgment of the court below be in all things affirmed.

It is further ordered that the appellants, Rebecca P. Schwanecke, M.D., F.A.A.P., etc., as a class representative; and Brenda Gomez, Individually, and as a class representative, and Heather Berkley, Individually, and Ann Richardson, as a class representative, and their surety, Lawyers Surety Corporation, jointly and severally, pay all costs incurred by reason of this appeal.

It is further ordered that this decision be certified below for observance."

I, KATHRYN COX, Clerk of the Court of Appeals for the First Supreme Judicial Cistrict of Texas, at the City of Houston, hereby certify that the foregoing is a true copy of the judgment rendered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book XX. Page 274.

IN WITNESS WHEREOF, I, hereunto set my hand and affix the seal

of said Court at Houston this 29th day of January 29 (sic), A.D. 1986
KATHRYN COX, CLERK
By /s/ Margie Thompson, Deputy

COURT OF APPEALS
FIRST SUPREME JUDICIAL DISTRICT OF TEXAS
1307 SAN JACINTO, 10TH FLOOR
HOUSTON, TEXAS 77002

ORDER

REBECCA P. SCHWANECKE, M.D.
APPELLANT

VS.

APPELLATE CAUSE
NO. 01-84-00664-CV

VASEEM ALI, M.D., ET AL
APPELLEE

On this 15th day of August 1985 came on to be considered Appellants' Motion for Rehearing

AND SUCH MOTION IS HEREBY OVERRULED

PER CURIAM

Panel consisting of Justices Smith, Bass and Duggan

A true copy attest:

KATHRYN COX
FIRST COURT OF APPEALS

BY/s/ Margie Thompson
Chief Deputy

Hon. Richard W. Schmude
P. O. Box 674
Tomball, TX 77375

Hon. Robert Bailey
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4800 InterFirst Plaza
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P. O. Box 12548, Capitol Station
Austin, TX 78711

Hon. Anita Jones
Hon. Craig Smyser
Vinson & Elkins
First City Tower, Suite 3123
Houston, TX 77002

THE STATE OF TEXAS *

COUNTY OF HARRIS*

I, KATHRYN COX, Clerk of the Court of Appeals, First Supreme Judicial District of Texas, at Houston, do hereby certify that the preceding 2 pages contain a true and correct copy of the judgment rendered and order overruling motion for rehearing. (sic) in Cause No. 01-84-00664-CV

REBECCA P. SCHWANECKE, M.D., F.A.A.P., ET AL, APPELLANT
VS.

VASEEM ALI, M.D., ET AL, APPELLEE
from HARRIS County, and now on file in my office
TO CERTIFY WHICH, I HEREUNTO SET MY HAND AND AFFIX THE SEAL OF
Said Court, at Houston, this 29th day of JANUARY A.D., 1986
KATHRYN COX, Clerk
/s/Margie Thompson, Deputy